

**Nanjing USA Inc. v LaMonica**

2010 NY Slip Op 31798(U)

July 9, 2010

Sup Ct, NY County

Docket Number: 100500/2009

Judge: Debra A. James

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

NANJING USA Inc.,

Plaintiff,

- v -

SALVATORE LaMONICA, as Chapter 7 Trustee of  
The BLOCK CORPORATION,

Defendants.

Index No.: 100500/2009

Motion Date: 04/27/10

Motion Seq. No.: 003

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

1

Answering Affidavits - Exhibits

2, 3

Replying Affidavits - Exhibits

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel for authorized representative must present to the County Clerk's Desk (Room**

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall deny plaintiff's motion for summary judgment in its favor and searching the record, the court grants defendant judgment on its first counterclaim declaring that plaintiff is not entitled to the return of its escrow deposit and that defendant is entitled to such escrow deposit as liquidated damages.

On or about October 27, 2008, plaintiff and the Block Corporation, which is now controlled by defendant trustee in bankruptcy, entered into a Transition and Inventory Purchase Agreement ("Purchase Agreement") and an Escrow Agreement in which

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

plaintiff would purchase approximately \$4,000,000 of Block's existing men's and women's clothing inventory and assume certain inventory replenishment programs with specified retailers, including Sears. Plaintiff seeks the return of its \$250,000 escrow deposit paid on the Purchase Agreement pursuant to the Escrow Agreement.

The Purchase Agreement provides, in pertinent part

D. Purchaser desires that Block continues to act as supplier of Pants for the Program until the close of business December 31, 2008 (the "Transition Date"). Block is willing to continue to do so provided that it receives adequate assurances that its Pants inventory will be purchased and taken over by Purchaser as of the Transition Date, subject to the terms of this Agreement.

\*\*\*

1. Transition Duties. During the period from the date of this Agreement and through the Transition period

\*\*\*

( c) Block will provide such information as may be reasonably requested by the Purchaser regarding Retailer's requirements and operational procedures in order to assist Purchaser in establishing Purchaser's own Program (the "New Program") as of the Transition Date.

\*\*\*

(e) Purchaser and Block each acknowledges to the other that Block, Retailer and Purchaser are independent parties and have no power to bind the other. ***Purchaser shall negotiate the terms and provisions of its New Program with Retailer and as between Block and Purchaser, Purchaser shall be solely responsible therefor.*** (Emphasis supplied.)

\*\*\*

2. Inventory and Escrow Funds.

\*\*\*

( c)...Purchaser acknowledges that Retailer (Sears) will require the payment or credit of an additional \$400,000

in the first quarter of 2009 which will be the direct responsibility of the Purchaser.

\*\*\*

3. Purchase and Sale.

\*\*\*

(f) ...If Purchaser fails to close on the purchase of Pants or to deliver funds as required hereunder, Block shall be entitled to payment to it of the Escrow Deposit (i.e., \$250,000) as liquidated damages and not as a penalty. Upon payment of liquidated damages to Block, the parties shall have no further obligations to each other hereunder.

4. Purchaser's Due Diligence Investigation Period.

\*\*\*

(a) Notwithstanding anything to the contrary, commencing upon execution of this Agreement, and ending on November 17, 2008 (the "Due Diligence Period"), Purchaser shall have the right to inspect the existing inventory of Pants and all documents related to the Program, the Pants and the supplier factories. ...

(b) Purchaser may elect to cancel this Agreement (or the entire portion thereof of a specified Retailer) for any reason by written notice to Block delivered on or before the end of the Due Diligence period: Purchaser may not contact any Retailer with regard to the Program or Purchaser's New Program prior to the expiration of the Due Diligence Period. Purchaser's right to cancel this Agreement (or the entire portion thereof of a specified Retailer) for any reason pursuant to the provisions of this paragraph 4(b) shall be null and void if such right is not timely exercised before the end of the Due Diligence Period.

(c) Either party shall also be entitled to cancel any portion of this Agreement thereafter with respect to a Retailer which does not approve the terms of Purchaser's New Program with such Retailer or Purchaser shall be entitled to cancel this Agreement in its entirety if Sears does not approve the terms of Purchaser's New Program with Sears.

(d) In the event that Purchaser cancels this Agreement in its entirety pursuant to this paragraph 4, the Escrow

Agent shall immediately return all sums, if any, held in escrow to Purchaser and all rights of obligations of the parties hereunder shall terminate without any liability of any party to any other party.

Plaintiff asserts that in early December 2008, it learned that the retailer Sears had expressed concerns over several material aspects of plaintiff's new pants program, including but not limited to the quantities and styles of inventory to be purchased and the pricing. Plaintiff alleges that

[a]s of December 19, 2008, Sears could not provide a definitive answer as to whether or not it would fully accept this major component of the inventory to be purchased. As a result, it did not approve [plaintiff's] program. To make matters worse, Sears informed Block that it did not plan to make a decision...until after a pants review meeting scheduled for January 6, 2009. This meeting was scheduled seven (7) days after the December 31, 2008 Transition date set forth in the Purchase Agreement. [Plaintiff] was required to begin servicing the accounts as of the December 31, 2008 Transition Date and the right to cancel would have then expired.

Plaintiff states that it requested Block to extend the January 2, 2009 payment deadline even though it could have exercised its right to cancel the Purchase Agreement as of December 18, 2009, the date that Sears first refused to accept its pants program. As a result of Block's refusal to extend December 31, 2008 Transition Date and the January 2, 2009 payment deadline, plaintiff "had no choice but to cancel the Purchase Agreement pursuant to ¶4(c) and ¶4(d) and demand the return of its \$250,000 Escrow Deposit", which it did on December 30, 2008.

Though this court agrees with plaintiff that the interpretation of a contract is a question of law appropriate for resolution by summary judgment [Hay Group Investment Holding B.V. v Saatchi & Saatchi, PLC, 223 AD2d 458 (1<sup>st</sup> Dept 1996)], it disagrees with plaintiff's argument about how the court should construct the Purchase Agreement.

The case of Salvin v Weidemann, 276 AD2d 434 (1<sup>st</sup> Dept 1950) is instructive. In Salvin, the appellate court determined that the contractual provision in question required that the vendor procure the act of a third person, which in Salvin was the approval of the title by the title company. Therefore, in Salvin the court affirmed the decision of Appellate Term, which, in reversing the trial court, held that the vendor was strictly bound by the terms of its agreement to show performance of any condition necessary to put the vendee in default. Since the burden was on the vendor to establish that the title company approved the title, the Salvin court held that the vendor had no right to require the vendee to perform and the vendee was entitled to return of its down payment under the contract of sale.

Here, in contrast, the clear terms of the Purchase Agreement place the responsibility on plaintiff, the vendee, to negotiate the terms and provisions of the New Program with Sears. Plaintiff has not met that burden since the fact that Sears held a pants

review meeting does not establish that Sears failed to approve its New Program.

Block was clearly within its right to demand that Plaintiff adhere to the terms of the Purchase Agreement, rather than accept Plaintiff's proposal to modify the terms of the Agreement and extend the Transition Date and payment deadlines. Since Plaintiff offers no proof that Sears failed to approve its New Program, it had no right to cancel the Purchase Agreement pursuant to ¶4. Plaintiff, therefore, is not entitled to the return of its escrow deposit pursuant to that paragraph. The court searches the record pursuant to CPLR 3212( c) and holds that Block is entitled to a summary judgment on its counterclaim declaring its entitlement to payment of that deposit as liquidated damages pursuant to ¶3(f).

Accordingly, it is

ORDERED that the motion for summary judgment in favor of plaintiff and against the defendant is DENIED; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff is not entitled to the return of the escrow deposit; and it is further

ORDERED, ADJUDGED and DECLARED that upon searching the record defendant's first counterclaim is GRANTED and it is DECLARED that defendant is entitled to such escrow deposit as liquidated damages under the Purchase Agreement under its first counterclaim, which is hereby severed, and the Clerk shall enter

judgment on the first counterclaim as aforesaid; and it is further

ORDERED that upon a search of the record defendant is GRANTED summary judgment on the second counterclaim and the determination of the amount of reasonable attorneys' fees, costs and disbursements under the Agreement is hereby referred to a Special Referee to hear and report pursuant to CPLR §4212 with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the second counterclaim is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that the defendant shall within 60 days of this date cause a copy of this order with notice of entry to be served on the Special Referee Clerk (Room 119, 60 Centre Street) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the second counterclaim shall be dismissed as abandoned if the defendant does not comply with the immediately preceding paragraph; and it is further

ORDERED that a copy of this order with notice of entry shall be served by defendant on the plaintiff within 20 days of entry hereof.

This is the decision and order of the court.

Dated: July 9, 2010

ENTER:

  
DEBRA A. JAMES

J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**